IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLAS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The point first to be determined in the decision of this case is the propriety of proceeding under the act of June 6, 1900, considered apart from the judgment of the Court of Appeals that further proceedings must be under the act of March 3, 1899.

By its terms the act of June 6, 1900 provided that its instrumentalities may be invoked to assess benefits resulting from the extension of Eleventh Street only "in the event

erty be set aside because made without warrant of law. But the Court of Appeals held that as he had not excepted to the verdict he could not avail himself of exceptions by others. Relief was denied. He was therefore required to relieve his property from the lien of the tax sale certificate at a cost of some $1,800.

The most curious result of the inconsistent and contradictory decisions of the Court of Appeals on the effect of such exceptions comes from the judgment of that court in the last case wherein the matter was considered—

Macfarland *vs.* Umhau, decided December 7, 1909.

(This case is not yet reported in the Appeal Cases, but is to be found in the 37th Washington Law Reporter, p. 818.)

This case arose under the act of March 3, 1899, for the extension of Sherman Avenue and involves the same proceedings that were considered in the case of Todd *vs.* Macfarland, *supra.* Todd's case, however, was a second appeal from an order confirming the verdict and was decided May 20, 1902.

Rosa Wallach, one of the plaintiffs in error, and her brother, the late Jesse Brown, inherited a considerable tract of land along the lines of Eleventh Street and Sherman Avenue in what is known on the city maps as "Todd and Brown's Subdivision." They were parties to the proceeding to extend Sherman Avenue, and when the verdict was returned May 9, 1900, they filed exceptions on the ground that the assessments were grossly excessive. Their exceptions were overruled, the verdict confirmed and an appeal noted. The case is reported as Brown *vs.* Macfarland, in 19 App. D. C., 525, and was decided April 1, 1902, about a month before the decision in Todd's case was promulgated.

On Brown's appeal, the order confirming the verdict of the jury was reversed and the cause remanded that "proceedings may be taken and the jury of twelve ordered, as directed by the statute."

Umhau, and many other owners of property on Sherman Avenue, had not excepted to the verdict but supposed that all property owners would be treated alike when the jury of twelve was impaneled. This was but natural, for the law required that at least one-half the amount awarded as damages should be assessed against lands within specified areas, and to set aside the assessments as to some property owners and not as to all would destroy the equation which Congress had enacted should be an indispensable prerequisite of the proposed extension.

Four years passed during which time nothing further was done. But on the 29th of June, 1906, Congress passed an act, presumably at the instance of the District Commissioners, providing for a reassessment on Sherman Avenue, again under the act of June 6, 1900. Three weeks prior to the passage of the act of June 29, 1906, and on June 6, 1906, a jury proceeding under the act of June 6, 1900, in this case, had made a reassessment on Eleventh Street of all property benefited or supposed to be, by the extension of that street. It was reasonable to suppose that similar proceedings would be instituted for reassessment along the line of Sherman Avenue, and Umhau and other non-exceptants rested in daily anticipation that this would be done.

But they were never summoned to appear before a second jury of reassessment. A supplemental petition was filed in the original cause on the 7th day of January, 1907, of which non-exceptants had no notice, warning some of those who had appeared before the first jury to be and appear before a second jury summoned as required by the act of June 6, 1900. None of the non-exceptants had notice of this supplemental petition. Instead, their property was advertised for sale in March, 1908, as for failure to pay the assessment levied by the first jury on May, 1900, nearly eight years before, which had been entered as a tax against their property on the books of the District Assessor. Eight or ten of these non-exceptants filed bills in the Supreme Court of the

District seeking to enjoin the threatened sale of their property and contending that they were entitled to the benefit of the law of June 29, 1906, which provided that assessments should be levied only to the extent of benefits actually conferred.

Restraining orders were issued as prayed but the Commissioners prayed a special appeal which was allowed, and Umhau's cause was selected as a test case. The order granting the temporary restraining order was reversed by the Court of Appeals, and the District authorities left at liberty to sell the property of all non-exceptants at any annual tax sale.

Briscoe *vs.* Macfarland, 32 App. D. C., 167:

This appeal also arose in the proceeding to extend Rhode Island Avenue under the act of February 10, 1899. On the incoming of the verdict, Briscoe filed exceptions on the ground that the assessment greatly exceeded the benefits and that the law in its operation was unconstitutional on the authority of Norwood against Baker, but the court overruled the exceptions and confirmed the verdict.

Some years later the Commissioners advertised his property for sale, for failure to pay the assessment. Briscoe thereupon brought his bill in the Supreme Court of the District setting out that he had filed exceptions to the verdict and claiming that the exceptions vacated the verdict as to him and entitled him under the law to a jury of twelve. The bill prayed that the sale might be enjoined and the assessments declared illegal and void. This was denied by the Court of Appeals on Briscoe's appeal from an order of the Supreme Court of the District dismissing his bill. In its opinion the court says (p. 175):

> "While it (the court below) acted contrary to law in not ordering the reassessment by a new jury, its order of confirmation is not void but erroneous and voidable merely."

This can only mean that the mere filing of exceptions has not the slightest effect on the verdict, for it does not prevent the court from confirming the verdict over the exceptions.

How then can the corporation counsel contend in this case (and the contention is made only in this case and now for the first time), that expressions of dissatisfaction by the property owners "nullified the original assessments." Not only do they not have that effect but they present not the slightest obstacle to the forays of the taxgatherer proceeding stealthily under the guise of conferring benefits.

From these citations it appears that the decisions of the Court on Appeals on this much-litigated question are utterly inconsistent. For Eleventh Street, as now contended by the Corporation Counsel, the rule is that exceptions nullify the verdict. This rule, however, does not extend in full vigor as far as Sherman Avenue, three hundred feet away, for, as decided in the Umhau case, exceptions on that street affect only the property of exceptants. Before we reach Rhode Island Avenue, not more than a mile away, the rule is entirely lost, and exceptions to the verdict of the jury of seven on that avenue as Briscoe has learned, have no effect whatever. And this in the very teeth of section 263, Chapter 11, R. S. D. C., that when property owners express dissatisfaction the Marshal *"shall be ordered to summon a jury of twelve"* and the previous ruling of the Court of Appeals in Brown's case that the summoning of such a jury is an *"express mandate of the statute."*

This is a condition that should not continue. It is simply intolerable, especially on Sherman Avenue where one lot owner is taxed only to the extent of benefits conferred, while the owner of the adjoining lot is taxed on an entirely different basis and without any regard whatever to benefits actually received. How these methods work out may be ascertained by a comparison of the two verdicts returned in this case. According to the first verdict, passed on the arbitrary apportionment theory, the aggregate of assessments

was $134,560 (No. 157 R., p. 4); under the second verdict, predicated of the benefit assessment theory, the aggregate was but $96,682. It is to be assumed that all of these property owners are law-abiding citizens and should be treated alike in all matters of taxation.

As was said by the late Justice Field in the case of

Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 549, 599.

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Plaintiffs in Error.

IN THE

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No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLAS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF OF THE PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

The several assessments against parcels of land which the plaintiffs in error must pay or procure to be paid are set out in the record at pages 19-23. They aggregate $7,700. In addition an assessment of $800, charged against lot 8, in block 13, which belonged to plaintiffs in error when the proceedings were instituted, was paid under protest, but with the understanding between Mr. Dulany and one of the Commissioners of the District that the amount would be returned in the event that the plaintiffs in error finally prevailed in their contention that the assessments were all invalid.

Proceedings in this case had been pending nearly seven years before the verdict of the second jury was returned. The continued delays on the part of the District authorities to complete the proceedings instituted by them was a great hardship on property owners affected thereby. Some lots belonging to the plaintiffs in error were sold at less than prevailing market rates subject to the assessments; others could not be sold except with guaranties that the lien of the assessments would be removed without cost to the purchasers.

The details of these sales and guaranties are shown in the affidavit of Henry Rozier Dulany, who has had exclusive charge of this matter for the plaintiffs in error since the inception of these proceedings, printed as an appendix to this brief.

This affidavit is submitted, in accordance with the long-established practice of this court, to show that the amount in controversy exceeds the jurisdictional amount when that fact does not affirmatively appear on the record.

Course *vs.* Stead, 4 Dall., 22.
Micas *vs.* Williams, 104 U. S., 556.
Whiteside *vs.* Haselton, 110 U. S., 296.

It is perhaps not out of place to call attention to the provision of section 4 of rule 6 of this court, which requires that notice of motions to dismiss writs of error and appeals must be served "on the counsel for plaintiff in error or appellant of record in this court at least three weeks before the time fixed for submitting the motion." This rule was not observed by counsel for defendants in error, who gave no notice or intimation of their intention to make the motions until the afternoon of Saturday, April 9, 1910, some days after the cause was on the daily call for hearing in this court.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Plaintiffs in Error.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLAS MERRIAM, *Plaintiffs in Error,*

vs.

HENRY B. F. MACFARLAND AND OTHERS, *Commissioners of the District of Columbia.*

DISTRICT OF COLUMBIA, *sct:*

Before me, the undersigned, a notary public in and for the District of Columbia, personally appeared in said District HENRY ROZIER DULANY, who, being first duly sworn, deposes and says:

I am a resident of the District of Columbia, and for twenty years last past have been engaged in business in Washington as a real estate, insurance, and loan agent.

As such agent I have had exclusive charge of land on both sides of the extension of Eleventh street N. W., in said city, belonging to the plaintiffs in error in the above-entitled cause.

When a petition was first filed in the Supreme Court of the District of Columbia by the Commissioners of said District, seeking to condemn the land necessary for the extension of said Eleventh street, under the act of Congress approved March 3, 1899, the said Rosa Wallach and her brother, the late Jesse Brown, owned the following-described

land, abutting on and within two hundred feet of the proposed new street, all in what is known as Todd and Brown's subdivision, against which assessments were levied by a jury of seven, as impaneled in said court in accordance with the prayer of said petition; block 16, lots 6, 12, and 13; block 17, part of lot 9; block 14, lot 4; block 18, lots 4 and 5, and lot 13, in block 8.

The assessments so returned against said lots belonging to the plaintiffs in error were vacated, and further steps of one sort and another were taken in the cause, but a second assessment by a jury was not made until June 6, 1906.

Meanwhile, and, to wit, on the 21st day of June, 1904, the said Jesse Brown died, and by his will devised his interest in said lots to the above-named Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglas Merriam.

Since the verdict of the said first jury was set aside I succeeded in selling for the plaintiffs in error some of the lots so belonging to them, subject to the assessments, at prices much below what would have been asked for them but for the cloud of said assessments. Others of said lots were also sold by the plaintiffs in error, but only on condition that they would undertake and agree to guarantee against any assessments that had been or might be made against said lots because of the extension of said street—that is, if such assessments were finally upheld and declared valid liens upon said lots the plaintiffs in error would cause them to be paid and satisfied without cost to the purchasers or any of them. Some of the lots so sold were subdivided by the purchasers and do not appear in the verdict of the second jury, as they were assessed by the first jury or in the names of the said plaintiffs in error, but are assessed by new subdivision numbers on said maps and to different owners.

Under said guarantees the plaintiffs in error are liable to have the lien of the assessments, set forth and shown in the said verdict of the second jury, removed from the following-named lots, and the amounts set opposite each lot paid and settled, viz:

Block 16, lots 79 to 92, being subdivision lots of part of lot 6	$2,300
Block 14, part of lots 3 and 4, as described on page 20 of the record	1,500
Block 18, lots 55 and 63, being subdivision of lots 4 and 5	1,450
Total	$5,250

The assessment levied by said second jury against lot 8, in block 13, belonging to the plaintiffs in error, and amounting to $800, was paid by this affiant, under protest, with the assurance from Commissioner Henry L. West that it would not in any sense be regarded as a payment to vitiate pending proceedings; in other words, with a tacit understanding that if the said assessment was finally declared invalid the money would be returned to the plaintiffs in error.

In addition to the aforegoing, the assessments returned by said second jury against lots near to and abutting on said Eleventh street are still unpaid as follows:

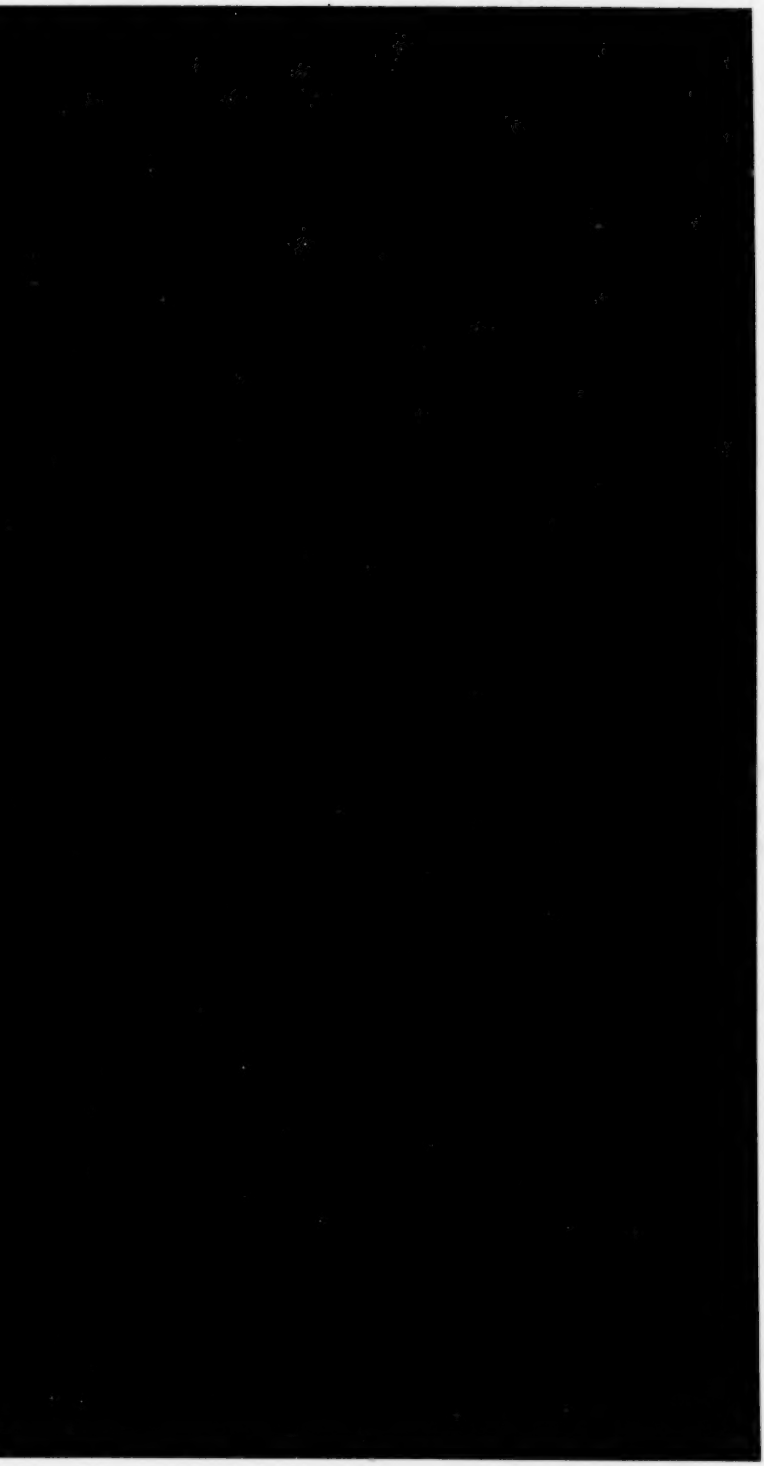
Block 16, lot 13	$400
Block 16, lot 12	50
Block 17, lot 9	2,000
Total	$2,450

To sum up, the plaintiffs in error are liable to pay or procure to be paid assessments returned by said second jury to the aggregate of $8,500.

HENRY ROZIER DULANY.

Subscribed and sworn to before me this 11th day of April, 1910.

ROBERT E. P. KREITER,
Notary Public, D. C.



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BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

On March 3, 1899, Congress passed an act entitled "An act to extend S street in the District of Columbia, and for other purposes," which provided for a number of street extensions, as follows, in part: (For act complete see Appendix.)

> "SEC. 3. That within ninety days after the passage of this act the Commissioners of the District of Columbia are hereby authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension of Eleventh

street northwest on a straight extension of the lines thereof, as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence with the same width and in a straight line to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue.

"That of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of 200 feet from the building lines of said Eleventh street as extended."

* * * * * * *

"SEC. 5. That the proceedings for the condemnation of said lands as provided for in sections one, two, and three and four of this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways;"

* * * * * * *

"SEC. 7. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into considera-

tion any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as is hereinbefore provided."

* * * * * * *

"SEC. 9. That payment of the awards made in respect of the property condemned shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed."

Chapter 11 of the Revised Statutes, referred to in section 5 of the above act, was a general law providing for the opening of highways in the District of Columbia, and its provisions, so far as they are material to this hearing, are as follows:

Sections 252 and 256 provide for the application to the proper authorities to open a new road; for notice to parties interested; for the appointment of a commission to lay out the road and report by them, and for the establishment of the road in case no objection is made. The act then proceeds: (Sections 252-267 complete in Appendix.)

"SECTION 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on the day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof."

Sections 258-262 prescribe the mode of procedure of the jury summoned by the marshal on the application of the proper authorities.

> "SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury."

Under the authority of these provisions the Commissioners of the District of Columbia instituted proceedings which were duly prosecuted to a verdict, returned by the jury on the 16th day of February, 1900, by which assessments aggregating $134,560 were found, of which $35,673 was against property of these appellants. On the 19th day of March, 1900, an order *nisi* was passed confirming the said verdict unless cause to the contrary should be shown on or before the 19th day of April, 1900, and thereafter a number of exceptions and objections to the verdict were filed by parties interested.

In the meantime the case of Davidson *vs.* Wight (16 App. D. C., 371), which involved the consideration of a provision of the same statute practically identical in terms with section 3 of the act quoted above, had been decided by the Court of Appeals of the District of Columbia, the court holding that the provision of the act which required the jury to assess one-half the amount of the awards upon the adjacent property was unconstitutional and void, and an appeal by the Commissioners of the District of Co-

lumbia from that decision to the Supreme Court of the United States was pending.

On June 6, 1900, while the exceptions and objections to the aforesaid verdict of the jury were pending, Congress passed an act entitled "An act for the extension of Columbia road, east of Thirteenth street, and for other purposes," which provided a different manner of procedure and a different theory of assessment from that provided in the act of March 3, 1899, the most important difference being that, instead of imposing upon the jury the duty of arbitrarily assessing a fixed proportion of the amount of the awards, the jury were directed to assess upon such property as they found would be benefited by the extension such a proportion of the awards for the land taken as they found said properties would be benefited by reason of the said extension; and provided further that, if the aggregate amount of the benefits assessed was less than one-half of the amount awarded for the land condemned, the Commissioners of the District of Columbia may, at their discretion, reject the award and assessment of the jury, and all proceedings thereunder should be null and void.

The concluding paragraph of section 12 of said act provides:

> "The Commissioners of the District of Columbia are hereby authorized and directed to make application to the Supreme Court of the District of Columbia holding a district court, for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street; and said awards, when so ratified, shall be paid as provided by said act of March third, eighteen hundred and ninety-nine, anything in said act to the contrary notwithstanding. And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any

reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this act." (Act set out in full in the appendix.)

On the 3d day of July, 1900, the cause coming on, upon the motion of the Commissioners of the District of Columbia, to ratify and confirm the verdict of the jury filed in the case, the court passed an order finally ratifying and confirming the several awards of the jury for and in respect of the land condemned for the extension of Eleventh street, and directing the payment of the several sums awarded by the jury for the lands aforesaid under the authority of the act of June 6, 1900, and the court further declared the several assessments for benefits returned and levied by the said jury illegal, null, and void, and the said assessments were set aside and vacated (R., 9).

From this decree, in so far as it declared the assessments for benefits to be illegal, null, and void, the Commissioners of the District of Columbia appealed to the Court of Appeals, and the case was heard in that court on April 1, 1902. The decision in the White and Davidson case, having in the meantime been reversed by the Supreme Court of the United States (181 U. S., 371), the Court of Appeals was constrained to reverse the order of the lower court, setting aside and vacating the assessments, and the case was remanded with directions to vacate such part of the order appealed from as vacated the assessments and for such other proceedings in the cause, according to law, as may be right and just. The court in its opinion however stated that it would be unjust to the parties interested to deprive them of a second hearing on objections filed, to which they were entitled under the original act authorizing the proceeding, by reason of the fact that

they relied on the decision of the Court of Appeals in the Wight and Davidson case, which had afterwards been reversed, the court further stating that justice required that they would be allowed their election whether to accept the verdict of the first jury or express dissatisfaction thereto, which would entitle them to a second hearing. (19 D. C. App., 531.)

From this decision an appeal was taken by the Commissioners to this court, which appeal was dismissed on the ground that the decree of the Court of Appeals was not a final decree. The mandate was returned to the Supreme Court of the District of Columbia on the 22d day of July, 1903, and on March 4, 1904, that court passed the following order (R., 12):

> "Upon consideration of the mandate of the Court of Appeals filed in this case, it is this 4th day of March, 1904, ordered that the decree in this case, vacating said assessment and only so far as it vacates said assessment, be and the same is hereby set aside and vacated, in accordance with said mandate. And the case being further heard on motion of the petitioners for confirmation of the assessment for benefits according to the verdict of the jury of seven, and after argument by counsel for the parties and due consideration of the exceptions of the respondents, from which it appears to the court that they and each of them are dissatisfied with said verdict, it is therefore ordered that said motion to confirm be, and the same is hereby in all respects overruled; and it is further ordered, in case the petitioners desire to proceed further in the premises, that they shall within a reasonable time make application to the court for directing the United States marshal to summon a jury of twelve as provided by law. To which

order petitioners except and pray an appeal in open court.

"ASHLEY M. GOULD, *Justice.*"

The appeal noted was never prosecuted.

On June 17, 1904, and before any proceedings were had under the aforesaid order, a motion was filed by "Abner Greenleaf and other property-owners, representative of record by Leo Simmons and Samuel Maddox," to dismiss the suit as to any further proceedings, because the law under which such proceedings must be had had been repealed; and, second, for failure of the petitioners to proceed as required by the order of this court passed on the acts of March 4, 1904, which motion was signed "Leo Simmons and Sam'l Maddox, attorneys for said owners," and upon the same date, June 17, 1904, the following order was passed (R., 13.):

> "Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904, it is, by the court, this 17th day of June, A. D. 1904, ordered, That the petitioners in the above-entitled cause, within sixty days from the date hereof, proceed in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the act of Congress approved June 6, 1900, entitled 'An act for the extension of Columbia Road east of Thirteenth street, and for other purposes.'
>
> "By the court.
>
> "(Signed) ASHLEY M. GOULD, *Justice.*"

Pursuant to the last order, and by leave of court, the Commissioners of the District of Columbia, on August 9, 1904, filed an amended and supplemental petition in which they set forth the filing of the original petition on May 31, 1899, the proceedings pursuant thereof culminating in the

return of the verdict of a jury on February 16, 1900; the passage of the act of June 6, 1900; the order of July 3, 1900, confirming the verdict as to the awards and vacating the same as to the assessments; the appeal to the Court of Appeals and the order of reversal therein; the order of March 4, 1904, vacating the prior order, which set aside the assessments, following the mandate of the Court of Appeals, and further overruling the motion and confirming the verdict by reason of the expressions of dissatisfaction; and the order of June 17, 1904, directing them to proceed in accordance with the provisions of the act of June 6, 1900; and the bill prayed for the summoning of a jury by the marshal that the reassessment might be had under the provisions of the said act (R., 14).

Notice by publication according to the provisions of the act of June 6, 1900, was given of the filing of the supplemental petition, setting forth its purpose and warning all persons having any interest in the proceedings to appear in court on a day named in the notice and continue in attendance until the court should have made its final order ratifying and confirming the reassessments and benefits of the jury to be impaneled therein. Thereafter a jury to reassess benefits was duly summoned and duly accepted and sworn by the court on March 16, 1906 (R., 51).

On March 29, 1906, these appellants filed pleas to the supplemental petition to the effect that the reassessments of benefits, if any, to lots owned by the appellants could be had only under and in accordance with the act of Congress approved March 3, 1899, under which the proceedings in this cause were instituted; and these appellants further pleaded that the cause of action set up in said petition filed on the 9th day of August, 1904, did not accrue within three years next before the filing thereof. The jury of reassessment returned their verdict on June 6, 1906, in which assessments aggregating $2,450 were returned against property owned

by the plaintiffs in error (R., 19), to which verdict, on July 5, 1906, these appellants filed exceptions (R., 23) based, in substance, on the following grounds:

That the assessments against the lots owned by them were unreasonable, excessive and unjust;

That it would be inequitable after the great lapse of time to confirm said assessments;

That the cause had not been proceeded with in accordance with the direction of the Court of Appeals and could not properly have proceeded except as so directed and submitting the matters at issue to a jury of twelve;

The plea of the statute of limitations;

That the commission or jury was not chosen or summoned as required by law;

That the jury was not sworn as required by law;

That the verdict of the jury was predicated on errors on the part of the presiding justice in granting and refusing certain instructions, as to which exceptions were noted at the time;

That the verdict was in disregard of the evidence and that the jury declined to receive certain evidence offered by the appellants and was sustained therein by the justice presiding.

The exceptions were overruled and the verdict was confirmed on May 6, 1907, from which judgment these appellants appealed to the Court of Appeals, which court affirmed the judgment of the Supreme Court of the District of Columbia, from which latter decision this appeal has been taken.

ARGUMENT.

I.

The Reassessment Proceedings Were Properly Had under the Act of June 6, 1900.

The provision of the above-named act pertinent to this discussion is:

> "And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street, shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for reassessment of such benefits under and in accordance with the provisions of this act."

The assessments referred to were first vacted by the order of July 6, 1900, which order was subsequently reversed by the Court of Appeals, that court, however, directing that parties interested should have the opportunity of expressing dissatisfaction and having the assessments vacated by that means if they so elected. Subsequent expressions of dissatisfaction by all of the property owners and the order of Justice Gould, March 4, 1904, predicated thereon, nullified the original assessments. And thereupon under the explicit and mandatory provisions of the act of June 6, 1900, it became the duty of the Commissioners of the District of Columbia to proceed for reassessment in the manner prescribed therein, no question being made as to its validity.

The Commissioners having been "directed" by the act of June 6, 1900, to make application for the final ratification and confirmation of the awards for land condemned for the extension of Eleventh street, filed February 26, 1900; and

the act having provided that "said awards, when so ratified, *shall be paid* as provided by the act of March third, eighteen hundred and ninety-nine, anything in said act to the contrary notwithstanding," no proceedings under the latter act could thereafter have been taken.

This is what the parties, represented now by the plaintiff in error, contended June 17, 1904, by their motion to dismiss the suit because the act of March 3, 1899, had been repealed by the act of June 6, 1900 (R., 13), and it is pertinent to observe that this motion was made for the purpose, apparently, of making it impossible for the Commissioners of the District of Columbia to proceed under the order of the court, passed May 4, 1904 (R., 13), which "further ordered, in case the petitioners desire to proceed further in the premises, that they shall, within a reasonable time, *make application* to this court for directing the United States marshal to summons a jury of twelve as provided by law" (act of March 3, 1899), and for the purpose of rendering that order abortive.

On this point we refer to the opinion of Associate Justice Barnard (R., 32, 33):

> "It is contended by counsel for the respondents that the Court of Appeals in the said case of Macfarland *vs.* Byrnes, decided that the respondents had a right to have a jury of twelve, and to proceed under the act of March 3, 1899, if they should so elect, and that the fact that the said act of March 3, 1899, had been held to be unconstitutional by the Court of Appeals would not be sufficient to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. The last part of this contention is no doubt correct, but it does not follow, when the respondents decline to accept the verdict of the jury, under the act of March 3, 1899, that they can still claim a right, or that it is the only method left open by the

law for them to have a jury of twelve and proceed under that law.

"The act of June 6, 1900, authorizes and directs the Commissioners of the District of Columbia to apply to this court for the final ratification and confirmation of the award of the jury, in respect to the damages for the land condemned for the extension of Eleventh street; and when said award is ratified said act provides for the payment of the said damages in accordance with the said act of March 3, 1899, 'anything in said act to the contrary notwithstanding.' This portion of the act of June 6, 1900, certainly changes the former law, section 9 of which prevented payment for damages until assessment for benefits had been made and confirmed. It is possible for the award of damages to be confirmed and the damages paid, without respect to the confirmation of the verdict assessing the benefits, under the said act of June 6, 1900, and such separation did in fact take place.

The award for damages was confirmed and the money paid, while the verdict, in so far as it assessed benefits, was vacated. It turns out that the vacation of that portion of the verdict was erroneous, because it was based on the theory that the law, so far as such benefits were concerned, was unconstitutional; but when the constitutionality of the said act, in respect to said benefits, was determined by the courts, the said order vacating the said assessment was set aside, leaving the verdict to stand so far as that objection was concerned. Thereupon the said verdict assessing benefits came again before the court for final confirmation, when it was made to appear to the court that each of the respondents or acceptants was dissatisfied with said verdict, on its merits. Whereupon, instead of confirming the verdict, the court overruled

the motion to confirm; and it first undertook to hold that the Commissioners might proceed under the act of March 3, 1899, by having the marshal summon a jury of 12; but the Commissioners not taking any step to proceed under the said act, by virtue of said order, the court, a little over three months later, but during the January term, passed the order of June 17, 1904, ordering the Commissioners to proceed within sixty days in accordance with the act of June 6, 1900, thereby in effect setting aside or modifying its former order *pro tanto*.

"It seems to me that this was competent for the court to do, on the theory that the dissatisfaction with the former verdict having been expressed by the property owners affected thereby, and insisted upon hearing the motion to confirm the said verdict, the court had no alternative but to refuse to confirm the verdict; and such refusal to confirm, and overruling the motion to confirm, was in effect an adjudication by the court of the invalidity of the said verdict, because the order was accompanied with the permission to proceed again to obtain a new jury; and when the said order of June 17, 1904, was passed, it seems to me it was warranted by the provision of the act of June 6, 1900, which provided in the event that the assessment for benefits should for any reason be declared void, the Commissioners were authorized and directed to apply to the court for a reassessment of such benefits, in accordance with the provisions of the said act of June 6, 1900.

"I do not understand that the Court of Appeals intended by the language used in the said case of Macfarland *vs.* Byrnes to hold that such order and such proceeding would be improper. The Court of Appeals expressly refused to direct what the proceedings should be in this court, leaving the landowners the

privilege of accepting the said verdict for assessment of benefits if they so elected; and on the other hand, if they elected to contest the matter further they were to have the opportunity to do so according to law.

"If the act of March 3, 1899, had not been held to be constitutional, there could have been no proceeding for a reassessment of benefits under the law, or the act of June 6, 1900, either, for the foundation for the whole proceeding would have dropped out.

"But when the law of March 3, 1899, was held to be constitutional, and when the act of June 6, 1900, modified it by providing for the separation of damages and assessments in the manner indicated; and when the effect of the subsequent order of the court was to adjudicate that the verdict making the assessment of benefits was void, because objected to by the landowners, then there seems to be no further method left for a reassessment than to follow the provisions of the act of June 6, 1900, because so far as that act is inconsistent with the act of March 3, 1899, it must necessarily repeal the former act; and it is inconsistent in several particulars, notably that of requiring a jury of seven instead of twelve, and in the matter of the oath of jurors as to the assessment of benefits, and as to the land upon which said benefits could be assessed, and also as to the amount of such benefits."

We also refer to the opinion of the Court of Appeals (R., 46):

"The first error assigned relates to the action of the court in ordering the proceeding to be continued under the provision of the act of June 6, 1900, instead of under the act of March 3, 1899.

"The substantial difference between the two acts

is that the former would require the new assessment to be made by a jury of twelve, while the latter limits the number to seven. The second, responding to a suggestion made by the court in Todd *vs.* Macfarland (20 App. D. C., 176, 184), cures the defect in the former relating to the payment of the assessed benefits in certain installments. The latter contains no limit of the area of assessment while the former does.

"We regard it as unnecessary to consider whether the later act was intended to supersede the former entirely as regards the reassessment of benefits under the proceeding pending when the same was approved. The appellant and others interested were apparently of the opinion that it did so, as is shown by their motion of June 17, 1904. The opposing parties accepting that view as correct, the court made the order of that day, and the proceedings were continued in accordance therewith, resulting in the verdict returned June 6, 1906, the confirmation of which is the subject of the appeal. No objection was raised to the new order of procedure until a late hour in the proceedings. The objection appears for the first time in the affidavit of Leo Simmons, filed February 7, 1907, which is recited in the preliminary statement of the case. This affidavit, which does not appear to have been acted upon by the court, unless it may be embraced in the final act of confirmation, fails to shew that the order of procedure was not his own conception, or that the motion had not been in fact filed. But were it more definite in its statement, it cannot be received to contradict the record. Having suggested the procedure under the later act and carried on the litigation, without objection, in accordance therewith, the appellant is estopped to object to the verdict on the ground alleged. Having made his

election he is bound by it. Iron Gate Bank *vs.* Brady, 184 U. S., 665, 668; Davis *vs.* Wakele, 156 U. S., 680, 689; Robb *vs.* Vos., 155 U. S., 1, 43; Clark *vs.* Barber, 21 App. D. C., 274, 280."

The sole ground upon which the appellants herein base their contention that the reassessment proceedings should be had under the provisions of chapter 11 of the Revised Statutes of the District of Columbia consists of a dictum of Mr. Justice Morris in his opinion on the appeal rendered in this case (Byrnes *vs.* Macfarland, 19 D. C. App., 531), as follows:

"There is, however, a third consideration, which we cannot ignore in the disposition of this case. By the act of Congress of June 6, 1900, already mentioned, it was provided that, if for any reason the assessments for benefits should be declared void, the Commissioners should make application to the court for a reassessment. This evidently has no reference to the invalidity consequent upon the judicial decision of the unconstitutionality of the act of Congress of March 3, 1899, for there could then, of course, be no lawful reassessment, since the foundation for the whole proceeding would fail. The holding of this court that the act of March 3, 1899, was unconstitutional did not therefore avail to set in motion the instrumentalities of the act of June 3, 1900, for reassessment. And when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of legislative authority, all reason for reassessment under the act of 1900 vanished. Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be restored to them, that of summoning a second jury of assessment under

> chapter 11 of the Revised Statutes of the United States for the District of Columbia, under which these proceedings were instituted and have been prosecuted, if they now desire to avail themselves of that right. They may prefer to forego that right, and they may prefer no longer to contest the propriety and justice of the assessment. If they so elect, the court will of course enter the proper order or decree in the cause. If, on the other hand, they elect further to contest the matter, according to law, they should have the opportunity to do so. This court, therefore, should not now direct any final order or decree to be entered by the court below in the premises."

The court intended that the order vacating the assessments to be passed in the lower court pursuant to their mandate should not be conclusive, and that the owners of property assessed might, notwithstanding that reversal, at their option have a second jury summoned, but the above expression, in so far as it relates to the functions of the act of June 6, 1900, is, it is submitted, a purely gratuitous dictum. The provisions of the act of June 6, 1900, which are adverted to by the court were in no way whatever involved in that appeal, and it is difficult to understand why the court should go outside of the case then in hand to discuss that statute.

Furthermore, the observations of the court are clearly founded upon a misapprehension of the scope and purpose of that law. After stating that the provisions of the law for reassessment upon the original assessments becoming void could have no reference to invalidity consequent upon the judicial decision of the unconstitutionality of the act of March 3, 1899, because there could then be no lawful reassessments, since the foundation for the whole proceeding would fail, the court proceeds further to say that, the constitutionality of the act of March 3, 1899, having in the meantime

been affirmed, all reasons for reassessment under the act of 1900 vanished.

The effect of this reasoning is that the statute never could have had any valid purpose. Its purpose could not have been, the court says, to meet the question of the unconstitutionality of the original law, and it could have no purpose, he further says, if the original law was constitutional. This, it is submitted, in effect, attributes to Congress the doing of a vain thing.

We submit that a clear and valid purpose is discernible in the act of June 6, 1900.

In the first place, it contemplated a reassessment under the more liberal provisions prescribed therein in case the original assessments were set aside by reason of the arbitrary requirement of the assessment of one-half in the original act.

In the second place, not all of the parties assessed in the first verdict had taken exceptions, and such parties would be in the position to oppose a rehearing as to their properties. Therefore a difficulty would be encountered in the matter of a second jury for assessments only, as distinguished from awards, under the original act, which would arise out of the provision requiring an assessment of a fixed proportion of the award. If a second hearing was a partial one only it would be impossible to maintain the relative proportion between the assessments and the awards which the provisions of the act require.

Again, the act of March 3, 1889, prohibited the payment of the awards until the assessments were confirmed. The act of June 6, 1900, contemplating the possibility that the assessments might fail of confirmation, authorized the payment of the awards without regard to whether or not the assessments might be confirmed.

This latter provision destroyed the integrity of the verdict and rendered further proceedings under the original law at least of doubtful feasibility.

Chapter 11 of the Revised Statutes of the District of Columbia, under which the proceedings were directed to be had, contained no provision for levying assessments, and hence, no provision for a second jury for re-levying assessments in case the original assessments became vacated independently of the awards. Judge Alvey, in the case of Todd against Macfarland (20 D. C. App., 176), in considering the act which provided for the extension of Sherman avenue under precisely similar provisions, regarded the verdict contemplated by Chapter 11 of the Revised Statutes and the act of Congress of March 3, 1899 as indivisable. Speaking to an argument that the provision of Chapter 11 of the Revised Statutes providing for a second jury related to awards only, and could not relate to assessments as distinct from the awards, the court said:

> "The argument appears to be that the owner of the land is not entitled to have the verdict set aside simply because he may be dissatisfied therewith by reason of the assessment made upon his land, though he would be entitled to have it set aside and the case referred to a jury of twelve merely by signifying his dissatisfaction with the award of damages—it being supposed that section 263 of chapter 11, Revised Statutes, only applies to proceedings of condemnation and award of damages, and not to the incident thereto of assessments for benefits. In other words, that the verdict of the jury, in respect to the same land, could be divided, and held good and effective as to the damages awarded, but, as might be determined, held bad and without effect as to the benefits assessed. This contention, if it were supported, might leave the District government in rather an awkward predicament. But there is in reality no foundation for any such contention. Both award of damages and assessments for benefits are authorized and required to be made by

section 5 of the act of Congress of March 3, 1899, and not by section 263 of chapter 11 of the Revised Statutes. Both award of damages and assessments are required to be made by the same jury and returned as an *entire verdict,* and which verdict is required to be ratified or set aside as found by the jury, as the same may apply to or affect any parcel of land. The section 263 of the Revised Statutes has reference only to the mode of procedure. If the verdict of the jury were to be ratified as to the damages awarded, but set aside as to the assessment for benefits, either by the court below or this court on appeal, the consequence would be that the land-owner would be exonerated altogether from all payment of assessments *as there is no provision in the law that would authorize subsequent separate assessments in such case.* That would contravene the plain intent and purpose of the statute."

While the opinion in which the language quoted occurs was rendered subsequent to the passage of the act of June 6, 1900, it illustrates the necessity for the passage of the act. The act authorized the separation of the awards from the assessments in the verdict, and hence, there being no adequate provision of law for reassessment, the act provided one.

We submit that it was the duty of the court to construe the act in respect of its evident purpose and intent rather than give it a construction, as the learned judge seems to have done, by which no valid purpose could have been imputed to it. This dictum, purely obiter, of Judge Morris, cannot, it is submitted, operate as a repeal of the provisions of the act of Congress of June 6, 1900, under consideration here, or expunge it from the statute books. It has *not* been repealed nor invalidated, and imposed a duty on the Commis-

sioners which they have undertaken to perform in this proceeding.

The power of Congress to enact such legislation cannot now be questioned:

> "Owing to the former tendency of the courts to construe all tax proceedings in favor of the taxpayer, many cases occurred where the mere non-observance of a very technical matter permitted the taxpayer to profit by the neglect, and obtain the benefit of the improvement, while contributing nothing to its payment, to the great detriment both of the contractors and the municipalities. To remedy these evils, corative or reassessment statutes have been passed by several legislatures, and their validity generally admitted. These statutes are commonly in furtherance of justice, and it may be accepted as a general statement that in all except certain jurisdictional matters, if the defect that makes the assessment void is an irregularity or error that the legislature might originally have authorized, or an omission to do that which it was competent for the legislature to dispense with by statute, it is within the legislative prerogative to authorize by subsequent act the correction of such error or omission, and allow the local authorities to make a new assessment in place of the one void for irregularity or error, and which will be no violation of the Constitution of the United States" (Hamilton, Law of Special Assessments, §823 and cases).
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> Spencer *vs.* Merchant, 125 U. S., 345.
>
> Farrell *vs.* West Chicago Park Comm'rs, 181 U. S., 404.
>
> *In re* Commissioners of Elizabeth, 49 N. J. L., 563.

Another circumstance enlightens this question. The cases of Todd against Macfarland, *supra*, and Brown against Macfarland (19 D. C. App., 525), involving the construction of precisely similar provisions in the act providing for the extension of Sherman avenue, were remanded to the Supreme Court of the District of Columbia by the Court of Appeals, under somewhat similar circumstances to the case at bar. The language of the mandate in these cases is: That the "order appealed from must be reversed, and the case remanded, that proceedings may be taken, and a *jury of twelve* ordered, as directed by the statute."

It is significant that the language of the order remanding the Byrnes case is:

> "The cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate such part of said order, and for such further proceedings in the cause, according to law, as may be just and right."

At that time there was no curative act affecting the Sherman Avenue case, but legislation similar to that under consideration here was afterwards enacted, under which reassessment proceedings were taken in that case.

Counsel for the plaintiffs in error in their brief, pages 11 and 12, say:

> "That on the part of the appellees in the former appeal (Macfarland *vs.* Byrnes, 19 App. D. C., 531) (not, however, the present plaintiffs in error) it was contended that the order of Mr. Chief Justice Bingham in declaring the assessments for benefits to be illegal and void set in motion the instrumentalities of the act of June 6, 1900, and that no further proceedings could be had in the cause under the act of March 3, 1899, not even by way of appeal from the

> order itself. This contention was strenuously opposed by the corporation counsel in an elaborate brief."

And again, on page 19, counsel state:

> "The main question before the Court of Appeals in Macfarland *vs.* Byrnes was whether the further proceedings should be under the act of March 3, 1899, or the act of June 6, 1900."

There is absolutely no warrant to be found in the record in that case for the assertions above quoted as far as they relate to the contention of the District of Columbia. The Macfarland *vs.* Byrnes case was an appeal by the Commissioners of the District of Columbia from the order of Justice Bingham vacating the assessments. The purpose of the appeal was to have that order reversed and the assessments confirmed; and, further, that those assessments should be adjudged as final and conclusive. The court, however, while reversing the order of the lower court which vacated the assessments, allowed the property owners their option as to the acceptance or the rejection of the assessments, which would involve further proceedings in case of property owners objecting. It was from this phase of the decision which the Commissioners of the District of Columbia appealed to the Supreme Court of the United States, as will be shown by the records and briefs in the cases of Macfarland *vs.* Byrne (187 U. S., 246) and Macfarland *vs.* Brown (187 U. S., 239).

II.

These Appellants Were Not Entitled to a Hearing by a Jury of Twelve on the Matter of Assessments.

It will be observed that section 5 of the act of March 3, 1899, provides, that the proceedings for the "*condemnation of said lands,*" not the proceedings for the assessments, shall be according to section 11, of the Revised Statutes of the District of Columbia, which provided only for a proceeding before a jury summoned by the marshal upon the application of the proper authorities, and did not provide for any proceeding whatever in court. The act of March 3, 1899, required the institution of these proceedings, to be by petition filed in court. There was no provision in chapter 11 for assessments of benefits by the jury, but that is provided by section 5 of the act of March 3, 1899. The verdict of the jury of award under the provisions of chapter 11, did not require confirmation by the court, to become effective, nor is there anything in the act of March 3, 1899, which requires the awards to be confirmed by the court, the sole provision in that regard being that payments of the awards were prohibited until the assessments were confirmed. On the other hand the assessments are required to be confirmed by the court before becoming effective. Reading both acts together it requires a strained construction to make the provisions of chapter 11 with respect to a second jury applicable to assessments found under the provisions of section 5 of the act of March 3, 1899.

Moreover that act arbitrarily requires the assessment of one-half the award, thus making the function of the jury with respect to assessments, essentially different from their duties with respect to the awards, as to which their discretion was unrestricted.

III.

These Appellants Are Estopped from Disputing the Proceedings under the Act of June 6, 1900.

It appears from the record (R., 13) that the order directing that the proceedings be had under the provisions of the act of June 6, 1900, was predicated upon and brought about by a motion filed by these appellants June 17, 1904, as follows:

> "Now come Abner Greenleaf and other property owners representative of record by Leo Simmons and Samuel Maddox and move the court to dismiss this suit, as to any further proceedings in this cause, because the law under which such proceeding must be had has been repealed. Second, for failure of the petitioners to proceed as required by the order of this court, passed in the cause on March 4, 1904."

And on the same date, June 17, 1904, the court passed an order directing proceedings to be had in accordance with the act of June 6, 1900, which order is prefaced by the words, "Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904."

No protest or objection of any kind was made to this order by any of the parties for a period of nearly two years after it was rendered, a supplemental petition and other proceedings having in the meantime been filed pursuant thereto.

Thus it appears that it was upon the motion of these appellants that the order under which the subsequent proceedings were had was predicated. It is respectfully suggested that they are estopped from asserting that the present proceedings are without authority of law, and, in any event,

that this apparent attempt to play fast and loose with the court should not be countenanced. If the motion of Abner Greenleaf and others had been expressly overruled by the court and proceedings directed for reassessment under the act of March 3, 1899, the jury would have been obliged to have returned a verdict assessing in the aggregate $134,000 rather than assessments aggregating $96,000 returned in the second verdict, based upon the unhampered discretion of the jury.

Parties cannot assume two inconsistent positions in the same controversy.

> "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis *vs.* Wakelee, 160 U. S., 680; also Iron Gate Bank *vs.* Brady, 184 U. S., 665, 668; Robb *vs.* Vos, 155 U. S., 1, 43; Clark *vs.* Barber, 21 App. D. C., 274, 280.

IV.

There was no Error in the Instruction of the Trial Judge Defining the words "Extension of the Street."

The fourth assignment of error relates to the concluding sentence of the first instruction given by the court to the jury, as follows:

> "By extension of the street the jury are to understand its establishment, laying out and completion

for all the ordinary uses of a public thoroughfare or highway."

The statute requires the jury to assess such benefits as they find against those pieces or parcels of land which they find will be benefited by the extension of the street. The argument that the word "extension" merely means the acquisition of the land necessary for the purpose of the extension and that the jury are limited to that consideration, would render the provisions with reference to assessments entirely vain. No possible benefit could result to any property by reason of the acquisition of this land unless the import of such acquisition was that it would be followed by the physical extension of the street. Moreover, the property-owners procured from the court an instruction under which they were awarded damages, predicated upon the physical extension of the street, and not merely the acquisition of the land and the demarkation of the street line (addition to Record). Their claim that they should be awarded damages for an actual street and assessed benefits for a paper street, involves a patent inconsistency. The definition of the word extension given the court, as modified by the other instructions given in the case, is, it is submitted equitable.

Sugar Refining Company *vs.* Mayor, etc., of Jersey City, 26 N. J. Equity, 254.

In this connection the attention of the court is called to the following language of section 2 of the act of June 6, 1900, respecting the assessment of benefits, "and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia Road as aforesaid." This language is meaningless if the contention of the plaintiffs in error is correct, that the benefits to be

assessed should relate simply to the condemnation of the land necessary for the street extension and not to the physical extension.

In the case of Bauman *vs.* Ross, 167 U. S., 585, the court discussed the meaning of the word "opening" in certain sections of the act of 1893, commonly known as the "Highway Extension Act," and held that that statute authorized merely the proceedings necessary to acquire the land necessary for streets and highways covered by the highway extension plan and not their physical opening, and in that respect the statute is similar to the statute under consideration here. In that statute it was provided that the jury in awarding damages for any piece or parcel of land taken for the extension of the street should take into consideration benefits accruing to the remainder of such piece or parcel of land by reason of the "condemnation" of the land necessary therefor, and certain other sections of the statute provided for the assessment of benefits generally resulting from the "establishment" of the street or highway. The court says (p. 594):

> "The reasonable construction is that the benefits to be taken into consideration and deducted in estimating the compensation or damages under sections 10, 11, and 13, are the special and direct benefits which the *appropriation* of part of a tract of land for a highway may cause to the remainder of the tract; and that the benefits for which an assessment is to be made under section 15 upon such remainders and upon all other lands benefited, are the general benefits accruing to all lands in the neighborhood from the establishment of the highway."

The same distinction can be observed between the provisions of Chapter XII, R. S. D. C., with respect to benefits to the remainder of a tract part of which was taken and the provisions of the special statute under consideration here. Under the

old law the jury in awarding damages were directed to take into consideration any benefits which they might find would result to the remainder of any tract by reason of the "condemnation" of part thereof for a street. The language of the act under consideration is that the jury shall assess benefits which they find will result from the *extension* of the street.

V.

The Other Instructions Granted and Refused by the Court.

A number of requests for instructions were submitted to the court on behalf of parties interested and of the petitioners, and were considered by the court. Some of them were refused, and others, after some modifications by the court at its own instance, were granted. The instructions given were as follows (R., 40, and stipulation):

> "It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street, northwest, extended, from Florida avenue to Lydecker avenue and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining the amounts to be so assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of the said pieces or parcels of land and the benefits that they have severally received from the said extension of the said Eleventh street. By extension of the street the jury will understand its establishment, laying out and completion of all ordinary uses of a public thoroughfare or highway.
>
> "The jury are instructed that in ascertaining whether any benefit has accrued to any piece or par-

cel of land abutting upon or within the vicinity of Eleventh street, extended, they shall not take into consideration any benefit that they find which has accrued to the land in question subsequent to the extension of the street. Therefore, in order to levy an assessment for benefits against any piece or parcel of land abutting upon said street or adjacent thereto the jury must find that the benefit upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by the extension of the car line in said street.

"The jury is further instructed that they are not bound to levy any assessment whatever for benefits in this case unless they find the property so assessed actually benefited by enhancement in value and that such benefit accrued immediately from the extension of the street in question.

"And in establishing such benefits, in case they shall find any, they shall take into consideration the damage done to any piece or parcel of land abutting said street or adjacent thereto by reason of leaving the same above the established grade thereof; that is to say, if they should find any piece or parcel of land benefited by the laying out and the opening of said street, and shall also find that by reason of the grade of said street being fixed at a point much below the level of such ground, and that such ground by reason thereof is left far above the said street grade so as to cause damage on account of grading the same, they shall take such grading into consideration, and if they find that the damage so sustained exceeds the benefits accruing, as formerly instructed, they shall not assess such piece or parcel of land at all; and in considering the benefits and the

damages caused by change of grade in extension of said street the jury should take into consideration the amount allowed, if any, for damages by reason of such change of grade by the former jury which assessed damages.

"The jury are instructed that they are not at liberty to levy any assessment against any piece or parcel of land abutting upon or adjacent to said Eleventh street unless they find such piece or parcel of land benefited by actual enhancement in value immediately upon the opening and extension of said street; and in considering whether or not any piece or parcel of land has enhanced in value they have no right to consider any enhancement or increase in value that is the result of any special improvement made upon the street after it was opened and established, as previously stated; neither have they the right to take into consideration any special improvement made upon any street crossing said Eleventh street."

These instructions, it is submitted, cover the law applicable to the case. An examination of the instructions which were refused by the court below will show either that they contained error or that the subject-matter of the instructions were substantially covered by those granted by the court.

So many instructions were requested by the various parties that the court properly epitomized the law applicable to the case in one set of instructions, which will be found to cover all of the essential features of the instructions refused which were sound in law.

The first instruction refused is practically identical with the second instruction granted by the court. The second and third instructions refused related to the refusal to admit the original verdict in evidence which is discussed elsewhere.

The fourth instruction refused clearly should not have been granted in the form requested, and is also covered by the second instruction which was granted. The fifth instruction refused involves the proposition which is discussed elsewhere in the brief as to the significance to be attached to the word "extension," and was properly refused.

VI.

The Court properly sustained the Chairman of the jury in refusing to receive in evidence the awards returned by the first jury for the land taken.

Counsel for the plaintiffs in error offered to introduce in evidence before the jury that portion of the original verdict containing the awards returned by the first jury for the land taken, but counsel for the District of Columbia objected to the introduction of any portion of the former verdict unless the entire verdict was introduced. Counsel for several of the other property-owners objected to the introduction of any part of the original verdict. The chairman of the jury refused to admit the verdict or any part of it in evidence, which action was certified to the court and the court sustained the chairman (R., 41). In this ruling of the court there was no error.

It is settled doctrine that the findings of a former jury are not competent testimony at a hearing *de novo* before another tribunal. It was contended in this case that the awards made by the first jury, having been ratified and accepted by the parties, were equivalent to a sale of the property, and should have gone to the jury on the question of the value of the property before the extension of the street, and would have aided the jury in determining the matter of benefits. This proposition is unsound and is not supported by the authorities.

Lewis on Eminent Domain, section 447, says:

> "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are effected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more, or the other taking less, than is considered to be the fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise." Citing numerous authorities.

This reasoning applies to the question at issue here. The District accepted the verdict of the first jury as to the awards because, as pointed out in the brief of No. 157, the Commissioners had no option in the premises. Under the act of June 6, 1900, they were required to apply to the court for ratification of the awards and directed to pay the same, and, therefore, the argument that the payment of the awards by the Commissioners placed the transaction in the same category as an ordinary sale is without foundation.

Again, it may be that the provision of the law under which the first jury acted, requiring the assessment of one-half of the amount upon the adjacent land, may have affected the awards made by the jury in respect of the portions of the same land which were taken for the extension of the street. Where the awards and assessments

are correlated, as they were in the first hearing, the awards of the jury, as evidence on the question of values, is open to the objections suggested by the foregoing paragraph from Lewis.

It is submitted, further, that it is not necessary for the court to instruct commissioners or jurors in advance in cases of this kind unless the statute expressly provides for it.

Baltimore *vs.* Hennessy, 21 D. C., 489.
Flint *vs.* Detroit, 64 Mich., 350.
People *vs.* Eldridge, 6 Thomp. and C., 20.

In the case in 21 D. C., 489, the court said:

> "Ordinarily this court, sitting in general term, does not undertake to give instructions in such cases as this. There are general principles which are well established to govern the proceedings; if there should be any departure from them the party who was injured can apply to the court to obtain redress.
>
> "In certain cases of great importance, particularly under statutes which seem to require such interposition, we have departed from this practice and in advance have given instructions. Such was the case in the condemnation proceedings with reference to the site of the Post-Office, of the Congressional Library, and the Rock Creek Park.
>
> "We do not think any necessity is shown why we should give special instruction in advance in this instance, nor do we see that any harm will result to the parties from our declining to enter on their examination at this time.
>
> "One or more of them embody principles so well established that an assent to them in advance would scarcely have more force than their assertion before the jury by counsel on one side and the necessary

admission of their correctness by counsel on the other side.

"In declining now to give any instructions we are not to be understood as giving any intimation as to their correctness or incorrectness as they are now presented for our consideration."

The Statute of Limitations.

It is contended by the appellants that the right to proceed under the act of June 6, 1900, was barred by the statute of limitations prior to the filing of the amended and supplemental petition in August, 1904, more than three years having elapsed since the order of Judge Bingham, of July 3, 1900, setting aside the assessments. While it is not denied that the statute of limitations runs against a municipal corporation with respect to any private right of action of the corporation, based on contract or tort, the rule is quite different with respect to the public rights and duties of municipal corporations.

Dillon lays down the rule on that question as follows:

> "Municipal corporations, as we have seen, have in some respects a double character, one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporation should not fall within limit statutes and be affected by them. For example, in an action on contract, or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or that of its officers can defeat the right of the public thereto. Yet there may grow up in conse-

quence private rights of more persuasive force in a particular case than those of the public. It will, perhaps, be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of the limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, since this leaves the courts to discharge the question, not by the mere lapse of time, but upon all the circumstances of the case, to hold the public estoppel or not as right and justice may require" (Dillon on Municipal Corporations, 695).

In Dixon *vs.* Railroad (1 Mackey, 83), where the plea of the statute of limitations was interposed, Mr. Justice Hagner said:

> "The right to recover damages for the depreciation of plaintiff's property by the inquisition, arises solely under the statute of 1872, and it is well settled that where the liability of a defendant is created, not merely by the act of the parties, but by the positive provisions of a statute, the plaintiff's remedy is not barred by the statute of limitations" (citing Angell on Limitations, section 8, p. 80).

The case of B. & O. R. Co. *vs.* District of Columbia (3 McArthur, 122) was a suit by the District of Columbia for unpaid tax, to which the plea of the limitation was interposed.

The court said, in regard to the length of time for which the company should be held liable:

> "We are of opinion that such liability reaches back for a period of twenty years from the institution of the present suit. It is a liability created by statute, and nothing short of a lapse of time sufficient to raise the presumption of payment will exonerate the property from its liability, and that period is twenty years."

In the case of McCartney *vs.* The People (202 Ill., 51), which was a suit on the part of the city to enforce the payment of a special assessment to which the statute of limitations was pleaded, the court said:

> "It is also contended that the city is barred from any further attempt to collect this assessment by the statute as to possession and payment of taxes for seven successive years, under claim and color of title paid in good faith, and by the laches of the county collector in failing to proceed to collect the same. It is a sufficient answer to both these positions to say that the statute of limitations does not run against a municipality acting in the discharge of a public duty. For like reasons the municipality cannot be prejudiced by the laches or omissions of duty by a public officer."

In the case of Greenwood *vs.* La Salle (137 Ill., 225), which was an action to recover a tax due on forfeited land, said the court:

> "It is first contended by counsel for defendant, that the court below erred in holding the plea of the statute of limitations bad. The attempt is made by opposing counsel to sustain that ruling, on the

ground that this is an action on a judgment, and, therefore, if the statute could be pleaded at all, the limitation would be twenty years instead of five. * * * The suit is for taxes due on forfeited property. Plaintiff below was only required to show a forfeiture in fact of delinquent land, at a regular tax sale for taxes legally due.

"The substantial, and, we think, valid objection to the plea is, that in this section no statute of limitations could run against the appellee, it being a quasi-municipal corporation. While the rule in this State is that the statute may be interposed to all actions by such corporations to enforce mere private rights, it is equally well settled that it is no defense to those involving public rights" (citing numerous cases).

But conceding, for the sake of argument, that the statute of limitations might be a proper defense in this case, there is, it is submitted, no merit in the contention that the right to proceed under the act of June 6, 1900, accrued on the third day of July, 1900, when the order of Judge Bingham vacating the assessments was passed. From that order the Commissioners noted an appeal. Its force and effect was suspended. When the appeal was heard the order was in fact reversed, and when the case came back on the mandate it was vacated. The right to proceed under the act of June 6, 1900, accrued, then, when the objections of the appellant were filed to the confirmation of the assessments upon the return of the mandate and upon the order of the court overruling the motion to confirm, which was passed on March 4, 1904.

Moreover, the proceeding was a continuous one; the amended and supplemental petition was no departure from the case originally begun. It was filed as a continuation of

the same proceeding under a later statute in obedience to the order of the court founded on appellant's motion, embodying the view that further proceedings could be had only under the later act.

The decision of the Court of Appeals should, it is respectfully submitted, be affirmed.

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attorneys for Defendants in Error.

APPENDIX.

The act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia Road east of Thirteenth street, and for other purposes," reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That within twenty days after the passage of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute in the Supreme Court of the District of Columbia, sitting as a district court, by petition, particularly describing the lands to be taken, a proceeding *in rem* to condemn the land that may be necessary for the extension of Columbia Road east of Thirteenth street, through block twenty-three of Columbia Heights, with a width of sixty feet, so that the western terminus of Steuben street will be connected in a direct manner with the eastern terminus of Columbia Road as now located west of Thirteenth street.

SEC. 2. That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia Road as herein provided, such amount thereof shall be assessed by the jury hereinafter provided as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of said Columbia Road as extended through block twenty-three of Columbia Heights, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia Road as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia Road as aforesaid: *Provided,* That if the aggregate amount of the benefits to be assessed, as determined by said jury pursuant to the provisions hereof, is less than one-half of the amount of the

damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void.

SEC. 3. That the said court shall cause public notice of not less than ten days to be given of the filing of said proceedings, by advertisement in such manner as the court shall prescribe, which notice shall warn all persons having any interest in the proceedings to attend court at a day to be named in said notice and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and assessment of benefits of the jury; and in addition to such public notice said court, whenever in its judgment it is practicable to do so, may cause a copy of said notice to be served by the marshal of the District of Columbia, or his deputies, upon such owners of the land to be condemned as may be found by said marshal, or his deputies, within the District of Columbia.

SEC. 4. That after the return of the marshal and the filing of proof of publication of the notice provided for in the preceding section, said court shall cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said court shall administer an oath or affirmation that they are not interested in any manner in the land to be condemned nor are in any way related to the parties interested therein, and that they will, without favor or partiality, to the best of their judgment, assess the damages each owner of land taken may sustain by reason of the extension of said street and the condemnation of lands for the purposes of such extension, and assess the benefits resulting therefrom as hereinbefore provided. The court, before accepting the jury, shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror or cause any vacancy in the jury, when impaneled, to be filled; and after said jury shall have been organized and shall have viewed the premises, said jury shall proceed, in the presence of the court, if the court shall so direct, or otherwise as the court may direct, to hear and

receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in the proceedings for the extension of said street. When the hearing is concluded the jury, or a majority of them, shall return to said court, in writing, its verdict of the amount to be found due and payable as damages sustained by reason of the extension of said street under the provisions thereof, and of the pieces or parcels of land benefited by such extension and the amount of the assessment for such benefits against the same.

SEC. 5. That if the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the extension of said street or highway, but such benefits shall be considered in determining what assessment shall be made on or against such part of such piece or parcel of land as may not be taken as hereinbefore provided.

SEC. 6. That the court shall have power to hear and determine any objections which may be filed to said verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury: *Provided*, That if vacated in part, the residue of the verdict and award as to the land condemned or assessed shall not be affected thereby: *And provided further*, That the exceptions or objections to the verdict and award shall be filed within thirty days after the return of such verdict and award.

SEC. 7. That when the verdict of said jury shall have been finally ratified and confirmed by the court, as herein provided, the amounts of money awarded and adjudged to be payable for lands taken under the provisions hereof shall be paid to the owners of said land by the Treasurer of the United States *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the Commissioners of said District, out of the revenues of the District of Columbia; and a sufficient sum to pay the amounts of said judgments and awards is hereby ap-

propriated out of the revenues of the District of Columbia.

SEC. 8. That when confirmed by the court the several assessments herein provided to be made shall severally be a lien upon the land assessed, and, shall be collected as special improvement taxes in the District of Columbia, and shall be payable in four equal annual installments, with interest at the rate of four per centum per annum from the date of confirmation until paid. That said court may allow amendments in form or substance in any petition, process, record, or proceeding, or in the description of property proposed to be taken, or of property assessed for benefits whenever such amendments will not interfere with the substantial rights of the parties interested, and any such amendment may be made after as well as before the order or judgment confirming the verdict or award aforesaid.

SEC. 9. That each juror shall receive as compensation the sum of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions hereof.

SEC. 10. That the sum of three hundred dollars is hereby appropriated, out of the revenues of the District of Columbia, to provide the necessary funds for the costs and expenses of the condemnation proceedings taken pursuant hereto.

SEC. 11. That no appeal by any interested party from the decision of the Supreme Court of the District of Columbia confirming the assessment or assessments of benefits or damages herein provided for, nor any other proceeding at law or in equity by such party against the confirmation of such assessment or assessments, shall delay or prevent the payment of award to others in respect to the property condemned, nor delay or prevent the taking of any of said property sought to be condemned, nor the opening of such street: *Provided, however*, That upon the final determination of said appeal or other proceeding at law or in equity, the amount found to be due and payable as damages sustained by reason of the extension of said street under the provisions hereof shall be paid as hereinbefore provided.

SEC. 12. That the provisions of sections three, four, five, six, seven, eight, and eleven hereof, and the provisions of

section two hereof as to the assessment of benefits and as to the right of the Commissioners of the District of Columbia to reject the award of the jury, be, and the same are hereby made applicable to the several Acts of Congress approved March third, eighteen hundred and ninety-nine, entitled "An Act to extend S street in the District of Columbia, and for other purposes," and "An Act for the extension of Pennsylvania Avenue, southeast, and for other purposes," in so far as the same relate to the extension of Sixteenth Street northwest, as amended by joint resolution approved the thirtieth day of January, nineteen hundred, to the extension of Pennsylvania Avenue southeast, the extension of Staughton street, the extension of Eckington Place, the extension of Fifth street, and the extension of Howard avenue, except, nevertheless, that the assessment areas fixed by said several Acts in reference to said several streets shall be and remain as in and by said Acts of Congress provided.

The Commissioners of the District of Columbia are hereby authorized and directed to make application to the Supreme Court of the District of Columbia holding a district court, for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street; and said awards, when so ratified, shall be paid as provided by said Act of March third, eighteen hundred and ninety-nine, anything in said Act to the contrary notwithstanding. And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this Act.

SEC. 13. That the name of Four-and-a-half Street northwest is changed to Fourth Street northwest.

Approved, June 6, 1900.

The act of Congress approved March 3, 1899, entitled "An Act to extend S street in the District of Columbia, and for other purposes," reads as follows:

[Public—No. 195.]

AN ACT to extend S street, in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within thirty days from the passage of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: *Provided,* That the owners of the "Kall" tract dedicate the land in said tract contained within the lines of said streets: *And provided further,* That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided.

SEC. 2. That within thirty days after the dedication to the District of Columbia of the lands lying within the lines of Sixteenth street northwest as extended (according to the highway plans), between the Piney Branch and the Blagden Mill road, and also between the Military road and the District of Columbia boundary line, the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary for the extension of Sixteenth street northwest from Morris street to the District of Columbia boundary line with the uniform width of one hundred and sixty feet. That of the amount found due and awarded as damages for and in respect of the land condemned for the extension of Sixteenth street as in this section provided, not less than one-half thereof shall be as-

sessed by said jury in said proceedings against those pieces and parcels of ground situated and lying on each side of said Sixteenth street northwest between Morris street and the Piney Branch, and between the Blagden Mill road and the Military road, to a depth of two hundred and fifty feet, measured on each side from the building lines of the said Sixteenth street as extended.

SEC. 3. That within ninety days after the passage of this Act the Commissioners of the District of Columbia are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary for the extension of Eleventh street northwest on a straight extension of the lines thereof, as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence with the same width and in a straight line to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue.

That of the amount found due and awarded as damages for and in respect of the land condemned under this Act for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of two hundred feet from the building lines of said Eleventh street as extended.

SEC. 4. That within ninety days after the passage of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary for the extension of New Hampshire avenue from the intersection of Whitney and Sherman avenues to the west line of Brightwood avenue at its intersection with the Rock Creek Church road, the same to be on a straight extension and of the same width of said avenue as now established in the subdivision of Petworth.

That of the amount found due and awarded as damages for and in respect of the land condemned under this Act for the extension of said New Hampshire avenue, at least one-half thereof shall be assessed by said jury in said pro-

ceedings against those pieces or parcels of ground abutting that portion of New Hampshire avenue to be opened, and extending to a depth of two hundred and fifty feet, measured on each side of the building lines of the said New Hampshire avenue as widened, and also on such other pieces or parcels of land as may, in the judgment of the said jury, be benefited by the extension and widening as herein proposed.

SEC. 5. That the proceedings for the condemnation of said lands as provided for in sections one, two, three, and four of this Act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings, the sum of two thousand dollars is hereby appropriated, out of the funds of the District of Columbia.

SEC. 6. That payment of the sum or sums of money adjudged to be due and payable for lands taken under the provisions of this Act shall be made by the Treasurer of the United States, *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the said Commissioners, out of the revenues of the District of Columbia; and a sufficient sum to pay such judgments and awards is hereby appropriated out of the revenues of the District.

SEC. 7. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as is hereinbefore provided.

SEC. 8. That when confirmed by the said court, the as-

sessments shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid: *Provided*, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this Act: *And provided further*, That no appeal by any interested party from any decision of the supreme court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned.

SEC. 9. That payment of the awards made in respect of the property condemned shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed.

Approved, March 3, 1899.

Sections 252 to 265, both inclusive, of the Revised Statutes of the United States relating to the District of Columbia, provide:

SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

SEC. 253. The proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed opening of the new road, or of the alteration of an existing one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard.

SEC. 254. If the route only is objected to, and another suggested as more advantageous, such route may be adopted, or five discreet, disinterested men, of whom the surveyor shall be one, may be appointed to examine all the proposed routes and report such one as they shall deem most feasible

and advantageous to the District, and such report shall be made to the authorities at their next meeting.

SEC. 255. If no objection to opening or altering a road is made by the owners of the land through which it must pass, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway.

SEC. 256. The notice required to be given by section two hundred and fifty-three need not be given when all the parties interested are agreed, and all roads laid out under such agreement without notice being given are lawful highways.

SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

SEC. 259. In cases where notice cannot be served on the owner, and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper

authorities at their next meeting, and which shall be recorded.

SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLASS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS THE APPEAL.

Now come the defendants in error and move the court to dismiss the appeal on the ground that the amount involved is less than $5,000, the sum necessary to give this court jurisdiction.

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attorneys for Defendants in Error.

From the record (pages 19-23) it appears that the only property subject to any of the assessments involved in this case, which is owned by the plaintiffs in error, consists of lot numbered 12, in block numbered 16, and part of lot numbered 9, in block numbered 17, the aggregate assessments against which amounts to $2,400. It is claimed by the plaintiff in error that pending this proceeding they sold certain other lots with a guaranty to indemnify the purchasers against prospective assessments arising from the extension of Eleventh street as to some of the properties so sold, which guarantee, it is claimed, imposed a contingent liability upon the plaintiffs in error which brings the amount involved above the jurisdictional amount.

This contention, it is submitted, is untenable. In the case of Hollander *vs.* Fecheimer, 162 U. S., 326, 328, this court said:

> "The whole basis of the decree, however, was the judgment for $1,000, which was the amount for which the general term directed a recovery. It is true that it also decreed the assignment to be void and remanded the case for further proceedings, that upon such further proceedings the court might direct an account to be taken and the property to be divided generally among the creditors, and that upon such accounting the plaintiffs might be admitted to prove the full amount of their claim. This amount, however, is not one directly involved in the decree, and the law is well settled that the jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either one of the parties through the probative effect of the decree, however direct its bearing upon such contingency. New England Mortgage Co. *v.* Gay, 145 U. S., 123. In that case, which was an action in assumpsit upon

promissory notes, there had been a finding by a jury that the transaction was usurious. The amount involved in the particular suit was less than $5,000, but the effect of the judgment under the laws of Georgia was to invalidate a mortgage given as security upon property worth over $20,000. It was held that, notwithstanding such indirect effect, this court had no jurisdiction, the amount directly in dispute being only the usurious sum. All the prior authorities upon the point are cited in this case."